UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
_____ DIVISION

AAA,	)	
	)	
Plaintiff(*s*),	)	
	)	
vs.	)	**Civil Action No. CV-03-S-0000-___**
	)	
BBB,	)	
	)	
Defendant(*s*).	)	

INITIAL ORDER GOVERNING ALL FURTHER PROCEEDINGS[1]

Nota bene

All parties must thoroughly review the provisions of this order, which shall govern all proceedings in this action, unless subsequently modified by written order for good cause shown.

I. DUTIES UNDER FEDERAL RULE OF CIVIL PROCEDURE 26(f) AND LOCAL RULE LR26.1(d)

The parties are reminded of their obligations under Federal Rule of Civil Procedure 26(f) and Local Rule LR26.1(d)[2] to confer, as soon as practicable, but in no event later than forty-five (45) days from the first appearance of a defendant,[3] for the purposes of: considering the nature and basis of their claims and defenses; the possibilities for a prompt settlement or resolution of the case; to make or arrange for the disclosures required by Fed.

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[1] The substantive provisions of this "Initial Order" were last revised on **November 19, 2003**. **DO NOT USE ANY EARLIER VERSION**.

[2] The Local Rules of this court may be accessed at http://156.130.8.3/.

[3] *See* LR26.1(d)(2).

R. Civ. P. 26(a)(1); and to develop a proposed discovery plan that indicates the parties' views and proposals concerning all of the matters addressed in sub-paragraphs (1) through (4) of Fed. R. Civ. P. 26(f).[4]

If the parties are unable to agree upon a date, time, or place for such conference, the parties are hereby ORDERED to meet at 10:00 o'clock a.m. on the last Friday falling within the forty-five day period specified in LR 26.1(d)(2) in the chambers of the undersigned judge in the United States Courthouse located at 101 Holmes Avenue in Huntsville, Alabama. If use of the court's chambers is required, counsel should telephone chambers (256-533-9490) at least seven days prior to the required meeting to advise the court. If a party is proceeding without counsel, the obligation to telephone chambers rests upon counsel for the opposing party.

A. Form of Report

The court expects a report of the parties' planning meeting, in the general format of the USDC ND Ala. Form 35, to be jointly filed by the parties within ten days after the meeting. Should there be an item about which the parties disagree, the positions of the

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[4] As the Supreme Court's Advisory Committee on the Federal Rules of Civil Procedure observed in the notes which accompanied the 2000 Amendments to Rule 26, there are "*important benefits to face-to-face discussion of the topics to be covered in the conference*, and those benefits may be lost if other means of conferring were routinely used when face-to-face meetings would not impose burdens." Fed. R. Civ. P. 26(f), Advisory Committee Notes, 192 F.R.D. 340, 393 (2000) (emphasis supplied). The court concurs with those observations, and states its *strong preference* that counsel meet face-to-face, rather than conferring by such means as telephone, or by exchanging facsimile or e-mail copies of scheduling proposals. Nevertheless, the Advisory Committee's notes make clear that "standing orders" requiring face-to-face conferences "are not authorized." *Id*. Accordingly, this order should not be misconstrued as so requiring.

parties as to that item should be clearly set forth in separate paragraphs. Upon receipt of the report, the court normally will enter a scheduling order, without conducting a separate Rule 16(b) scheduling conference. The parties should notify the court if they believe a Rule 16(b) conference is necessary.

1. Compliance with HIPAA

In accordance with the requirements of the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"), Pub. L. No. 104-191, 110 Stat. 1936 (1996),[5] and regulations promulgated thereto,[6] when "protected health information"[7] is relevant to the claims or defenses presented in an action, the party seeking such "protected health information" shall present a valid authorization at the Rule 26 planning meeting to be executed by the party from whom such "protected health information" is sought. The parties shall include in their report a deadline (specific date) by which the authorization will be executed. Alternatively, the parties may present the court a "qualified protective order" in substantially the form attached to this order as **Appendix I**, to be entered by stipulation of counsel for all parties.[8]

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[5] A citation to HIPAA is not easily provided, because Congress scattered the sections of the Act throughout Title 42 of the United States Code. *See*, *e.g.*, *South Carolina Medical Association v. Thompson*, 327 F.3d 346, 348-49 (4th Cir. 2003).

[6] 45 C.F.R. § 160.101 *et seq*.

[7] 45 C.F.R. § 160.103.

[8] The United States Department of Health and Human Services has promulgated regulations governing the disclosure of protected health information protected by HIPAA. The provisions related to the disclosure of protected health information for purposes of judicial proceedings is found at 45 C.F.R. § 164.512(e), reading, in part, as follows:

> **(1) Permitted disclosures**. A covered entity may disclose protected health information in

the course of any judicial or administrative proceeding:

> **(i)** In response to an order of a court or administrative tribunal, provided that the covered entity discloses only the protected health information expressly authorized by such order; or
>
> **(ii)** In response to a subpoena, discovery request, or other lawful process, that is not accompanied by an order of a court or administrative tribunal, if:
>
> > **(A)** The covered entity receives satisfactory assurance, as described in paragraph (e)(1)(iii) of this section, from the party seeking the information that reasonable efforts have been made by such party to ensure that the individual who is the subject of the protected health information that has been requested has been given notice of the request; or
> >
> > **(B)** The covered entity receives satisfactory assurance, as described in paragraph (e)(1)(iv) of this section, from the party seeking the information that reasonable efforts have been made by such party to secure a qualified protective order that meets the requirements of paragraph (e)(1)(v) of this section.
>
> . . .
>
> **(iv)** For the purposes of paragraph (e)(1)(ii)(B) of this section, a covered entity receives satisfactory assurances from a party seeking protected health information, if the covered entity receives from such party a written statement and accompanying documentation demonstrating that:
>
> > **(A)** The parties to the dispute giving rise to the request for information have agreed to a qualified protective order and have presented it to the court or administrative tribunal with jurisdiction over the dispute; or
> >
> > **(B)** The party seeking the protected health information has requested a qualified protective order from such court or administrative tribunal.
>
> **(v)** For purposes of paragraph (e)(1) of this section, a qualified protective order means, with respect to protected health information requested under paragraph (e)(1)(ii) of this section, an order of a court or of an administrative tribunal or a stipulation by the parties to the litigation or administrative proceeding that:
>
> > **(A)** Prohibits the parties from using or disclosing the protected health information for any purpose other than the litigation or proceeding for which such information was requested; and
> >
> > **(B)** Requires the return to the covered entity or destruction of the protected health information (including all copies made) at the end of the litigation or proceeding. . . .

45 C.F.R. § 164.512(e)(1).

In addition to the matters required to be discussed and reported under Federal Rule of Civil Procedure 26(f) and Local Rule LR26.1(d), the parties shall consider whether this action may be suitable for mediation under the Alternative Dispute Resolution Plan adopted by the court.[9] The result of those discussions shall be included in the report to be made to the court.

C. Commencement of Discovery

The parties are authorized to commence discovery pursuant to the terms of Federal Rule of Civil Procedure 26 and Local Rule LR26.1 immediately after the required report has been filed. In cases removed from state court in which any discovery requests were filed before such removal, those discovery requests shall be deemed to have been filed on the date the report required by Fed. R. Civ. P. 26(f) and LR 26.1(d) is filed in this court.

In the event of a dispute between the parties regarding the sequence of depositions, the plaintiff(s) shall be deposed before taking the deposition(s) of the defendant(s).

D. Dismissal of Fictitious Defendants

There being no fictitious party practice in the courts of the United States, it is hereby **ORDERED** that this action is **DISMISSED** as to any fictitious parties named in the caption or body of the complaint. Such dismissal, however, is without prejudice to the right of any party to take advantage of the provisions of Rule 15(c), Fed. R. Civ. P.

E. Dismissal of Non-Served Defendants

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[9] See the Appendix to the Local Rules of the United States District Court for the Northern District of Alabama at http://156.130.8.3/.

Nota bene: Any defendant who has not been served with summons and complaint within 120 days after the filing of the complaint *will be dismissed*, *without further notice*, *unless* prior to such time the party on whose behalf such service is required shows good cause why service has not been perfected.

II. ATTORNEY FEE SHIFTING CASES

If a party anticipates that, during or upon the completion of this action, it may for any reason (other than as a sanction under the Federal Rules of Civil Procedure) seek an award of attorneys' fees from the opposing party pursuant to any statute or other law, the party must comply with the following requirements as a precondition to any such award:

A. Maintenance of Separate Records

Counsel must maintain a separate record of time with a complete and accurate accounting of all time devoted to this particular action (to the nearest 1/10th of an hour), recorded contemporaneously with the time expended, for each attorney and with sufficient detail to disclose the nature of the work performed in the action (*e.g.,* not just "research," but the specific matter being researched; not just "conference," but the identity of the persons conferring, and, a description of the subject matter(s) discussed during the conference).

B. Filing Time Records

Counsel must file *either* a copy of the time record referred to in paragraph II.A above, *or* file a separately prepared document setting forth the information described in paragraph II.A above, with the Clerk of the Court by the fifteenth (15th) day of each month during the

pendency of the action, for work done during the preceding month.

C. Maintenance of Separate Records for Non-Lawyers

If a claim will be made for services performed by any person who is not a member of the bar, a separate time record shall be maintained for each such individual in accordance with paragraph II.A above, and either a copy thereof or a separately prepared document setting forth the same information filed in accordance with paragraph II.B above.

D. Filing Under Seal

The material to be filed under paragraphs II.B and C above may be filed under seal, subject to further court order, by placing the same in a sealed envelope with the case name and number along with "ATTORNEY TIME RECORDS — FILED UNDER SEAL" written thereon. If the material is filed under seal, however, then the filing party must, at the time of such filing, also file (and serve a copy thereof on opposing parties or their counsel) a document stating the total of the hours represented by the sealed filing, allocated as to total attorney hours and total non-attorney hours included in the current filing under seal. Upon the conclusion of this case, and without further order, the seal will be lifted as to all materials filed under seal.

***Nota bene*: Failure to comply with the foregoing requirements will result in attorneys' fees being disallowed for the omitted period.**

III. CASES THAT REQUIRE EEOC CHARGES

If this is a case in which the filing of a charge of discrimination with the Equal

Employment Opportunity Commission or similar agency is required as a prerequisite to suit, then, *within fifteen* (15) *days of the date on which this order is entered*, the plaintiff(s) **MUST SUPPLEMENT** the complaint filed herein by filing with the Clerk of Court: (**A**) a copy of all charges of discrimination filed with the EEOC and which form the bases of the action; *and* (**B**) a copy of the EEOC's response to all such charges of discrimination filed with that agency, *including* the notice of right to sue.

IV. MOTION PRACTICE

A. Motions Requiring a Written Response

A non-moving party *must file* a written response to any of the following motions *within ten* (10) *days* of the date on which the motion is *filed* (*not* served):[10]

1. Motions filed under Fed. R. Civ. P. 12;

2. Motions to quash service of process;

3. Motions to remand or transfer venue;

4. Motions to compel arbitration;

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[10] See Federal Rule of Civil Procedure 6(a), providing that:

> **(a) Computation**. In computing any period of time prescribed or allowed by these rules, by the local rules of any district court, by order of court, or by any applicable statute, the day of the act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a legal holiday, or, when the act to be done is the filing of a paper in court, a day on which weather or other conditions have made the office of the clerk of the district court inaccessible, in which event the period runs until the end of the next day which is not one of the aforementioned days. When the period of time prescribed or allowed is less than 11 days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation. As used in this rule and in Rule 77(c), "legal holiday" includes New Year's Day, Birthday of Martin Luther King, Jr., Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans Day, Thanksgiving Day, Christmas Day, and any other day appointed as a holiday by the President or the Congress of the United States, or by the state in which the district court is held.

5. Motions to intervene;

6. Motions to compel discovery;

7. Motions to quash a subpoena, a subpoena *duces tecum*, or deposition notice;

8. Motions for protective orders;

9. Motions for sanctions; and,

10. Motions for leave to amend complaint.

***Nota bene*: In the event a non-moving party fails to file a written response to any of the foregoing motions within the time allowed for doing so, *the court will assume, without further notice, that the non-responding party has no opposition to the motion and rule accordingly*.**

In the event the court should require a written response to a motion not listed above, the parties shall be so advised by separate order.

B. Certification That Parties Have Attempted to Resolve Disputes Without Court Action

The parties are reminded that Fed. R. Civ. P. 37(a)(2) requires that any motion to compel discovery requires a certification that the movant has in good faith conferred, or attempted to confer, with the party not making the disclosure in an effort to secure disclosure without court action. Failure to include a certificate of conference will result in the motion being denied on its face for failure to comply with the procedures of this court.

C. Motions for Summary Judgment

Any motion(s) for summary judgment filed in this action ***must comply*** with ***all*** requirements of **Appendix II** to this order.

V. MOTIONS TO APPEAR PRO HAC VICE

Any attorney desiring to be temporarily admitted to the bar of this court for the particular purpose of representing a party during proceedings occurring in this case only must comply with Local Rule LR83.1(b), reading as follows:

> Any attorney who is not a member of the bar of this court but who is admitted to practice before the United States District Court *for the district in which* (or before *the highest court in the state in which*) such person **resides** *or* **regularly practices law**, may, upon request and payment of the prescribed fee[11] (unless payment is waived by special order of the court), be allowed to appear in a case pro hac vice by an order of any district judge or bankruptcy judge of this court. Any such attorney who appears as counsel by filing any pleading or paper in any case pending in this court shall *within ten days thereafter* apply to appear pro hac vice as set out herein. An attorney permitted to appear under this subsection is deemed to have conferred disciplinary jurisdiction upon this court for any alleged misconduct arising in the course of, or in preparation for, proceedings in the case; and for purposes of subsection (h) of this Rule[12] the attorney shall be treated as if a member of the bar of this court with respect to acts and conduct in connection with such case.

LR83.1(b) (italicized and boldface emphasis supplied).

VI. MOTIONS FOR PERMISSION TO WITHDRAW

Once an attorney has appeared as counsel for a party, *he or she may not withdraw from the action merely by filing a* "notice of withdrawal," but must file a motion seeking permission of the court to do so, explicitly stating the grounds therefor.

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[11] The prescribed fee presently is $50.00 for each attorney who seeks admission *pro hac vice*.

[12] Local Rule LR83.1(h) pertains to disciplinary procedures and sanctions against attorneys for misconduct arising in the course of, or in preparation for, proceedings in cases in this court.

Any motion to withdraw which, if granted, would leave a party *unrepresented* by counsel *must* include the following: **(a)** a certification that the moving attorney has *both* **(i)** served a copy of the motion on his or her client(s) *and* **(ii)** informed the client(s) of the right to file an objection with the court within ten (10) days of the date of notification; and **(b)** the most recent address(es) and telephone number(s) of the client(s).

Further, counsel who seek to withdraw from the representation of corporate clients are forewarned that corporations (or other entities created by law) may appear only by attorneys and not *pro se*. *See Palazzo v. Gulf Oil Corp*., 764 F.2d 1381, 1385 (11th Cir. 1985).

DONE and **ORDERED** this _____ day of XXXX, 2003.

_____
United States District Judge

APPENDIX I
FORM OF HIPAA QUALIFIED PROTECTIVE ORDER
(Stipulated for Entry by Counsel for All Parties)

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
_____ DIVISION

AAA,	)	
	)	
Plaintiff(*s*),	)	
	)	
vs.	)	**Civil Action No. CV-03-S-0000-___**
	)	
BBB,	)	
	)	
Defendant(*s*).	)	

QUALIFIED PROTECTIVE ORDER

In accordance with the stipulation of counsel for all parties, as evinced by their signatures below, the parties are hereby granted the right, upon compliance with the applicable discovery provisions of the Federal Rules of Civil Procedure, to obtain from any health care providers, health plans, or other entities covered by the Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191, 110 Stat. 1936 (1996) ("HIPAA"), any and all information relating to the past, present, or future medical condition of any individual who is a party to this action (or the decedent or ward of a party who sues in a representative capacity), as well as any and all information relating to the provision of health care to such individual and payment for the provision of such health care. This Protective Order is intended to assist the parties to this action, and third-parties who receive subpoenas from the parties, to comply with the privacy requirements imposed upon protected health information by HIPAA and regulations promulgated thereto. The parties are expressly prohibited from using or disclosing the protected health information obtained pursuant to this order for any

purpose other than this action. Further, the parties are ordered to either return to the covered entity from whom or which such protected health information was obtained, or to destroy the protected health information (including all copies made), immediately upon conclusion of this action. *See* 45 C.F.R. § 164.521(e)(1)(v).

STIPULATED FOR ENTRY this _____ day of _____, 200___, by all counsel of record:

_____	_____
Attorney for Plaintiff Firm Name Address Telephone No.	Attorney for Defendant Firm Name Address Telephone No.

APPROVED and **SO ORDERED** this _____ day of _____, 200___.

_____
C. Lynwood Smith, Jr.
United States District Judge

APPENDIX II
SUMMARY JUDGMENT REQUIREMENTS[13]

NOTICE
This exhibit contains specific, mandatory instructions regarding the preparation and submission of briefs and evidentiary materials in support of and in opposition to potentially dispositive motions. **These instructions *must* be followed explicitly**. **Except for good cause shown, briefs and evidentiary materials that do not conform to the following requirements will be stricken**.

SUBMISSION DATES

When a potentially dispositive motion is filed, the court will issue a submission order, establishing specific deadlines for filing briefs and evidentiary materials in opposition to the motion, and, in reply to the opposition. The parties *must* comply with the specified deadlines.

To ensure that each party is afforded a full and fair opportunity to be heard, the parties *must* cause copies of briefs and evidentiary materials to be delivered to opposing parties without undue delay and, generally, on the same date such materials are submitted to the court.

SUBMISSIONS

The parties' submissions in support of and opposition to potentially dispositive motions must consist of: (1) a brief containing, in separately identified sections, (i) a statement of allegedly undisputed facts and (ii) a discussion of relevant legal authorities; and (2) copies of any evidentiary materials upon which the party relies. More detailed

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[13] The substantive provisions of this Appendix were last revised on **August 26, 2003**. **DO NOT USE ANY EARLIER VERSION**.

requirements for these submissions are explained in the following sections.

REQUIREMENTS FOR BRIEFS

A. Format

Briefs that exceed twenty pages must include a table of contents that accurately reflects the organization of the document. The text of briefs must be double spaced (except for quotations exceeding fifty words, which may be block indented from the left and right margins and single spaced) using twelve point typeface, preferably Times New Roman.

B. Number Submitted

The parties must file the original brief with the Clerk of Court, and simultaneously submit an exact copy of the original to the court in chambers,[14] together with a virus-free diskette containing an electronic copy of the brief in Word Perfect format (or a format that can be converted to Word Perfect).

C. Binding

The Clerk *will not accept bound materials* for filing, but the court's copy of the brief *must be securely bound* for ease of use, *and*, to prevent inadvertent loss of pages.

D. Manner of Stating Facts

All briefs submitted either in support of or opposition to a motion must begin with a statement of allegedly undisputed facts set out in *separately numbered sentences*. Counsel must state facts in clear, unambiguous, simple, declarative sentences.

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[14] The Clerk's office will accept an original for filing and a copy for transmittal to the court's chambers.

1. Moving party's initial statement of facts

The moving party shall list in *separately numbered sentences* each material fact the movant contends is true and not in genuine dispute, and upon which the moving party relies to demonstrate that it is entitled to summary judgment. Each such statement must be followed by a specific reference to those portions of the evidentiary record which the movant claims supports it.[15]

2. Opposing party's statement of facts

Each party opposing a potentially dispositive motion also must submit a statement of facts divided as follows.

a. Response to movant's statement

The first section must consist of only a response to the moving party's claimed undisputed facts, and shall contain a specific response to each numbered sentence in the movant's list of claimed undisputed facts. The response must consist of the word "Admitted," or the word "Disputed," or a short explanatory phrase such as "Admitted but not material," or "Admitted but context clarified in brief." Any statements of fact that are disputed by the non-moving party must be followed by a specific reference to those portions of the evidentiary record upon which the disputation is based.[16] *All material facts set forth*

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[15] Each sentence should be separately numbered with its own evidentiary citation, regardless that more than one sentence is purportedly supported by the same specific reference to the evidentiary record.

[16] The court requires each sentence to cite a reference to the record because, typically, the non-moving party bears the burden of proof. By so requiring citation to the record, the court does not intend to prevent a non-movant from arguing that the movant has failed to carry its initial burden under *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986).

in the statement required of the moving party will be deemed to be admitted for summary judgment purposes unless controverted by the response of the party opposing summary judgment.

b. Additional undisputed facts

The second section may contain additional, allegedly undisputed facts which the opposing party contends require the denial of summary judgment. The second section of the opposing party's statement of facts, if any, shall be clearly designated as such, and must be set forth in *separately numbered sentences*. The opposing party should include only facts which the opposing party contends are true and not in genuine dispute.[17] Each such sentence shall contain a specific reference to those portions of the evidentiary record which the party claims supports the statement of fact.[18]

3. Moving party's reply

In its reply submission, if any, the moving party shall include a separate reply to the additional facts submitted by the party opposing summary judgment. This reply shall contain a specific response to each numbered sentence in the statement, either admitting or disputing the matter set forth in that sentence; and, in the case of a disputed fact, a specific reference

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[17] The court recognizes that, in some circumstances, a party opposing a motion for summary judgment may want to set out facts which that party claims are true and supported by evidence, but cannot, in good conscience and consistent with Rule 11, say are undisputed. In such case, the party should include a separate section of fact statements, set out in short declarative sentences and individually numbered paragraphs, which are supported by some evidence but, nevertheless, are in dispute. When doing so, however, the party should include record citations which both support and contradict the alleged fact.

[18] Each sentence should be separately numbered with its own evidentiary citation, regardless of the fact that more than one statement of fact allegedly is supported by the same specific reference to the evidentiary record.

to the evidentiary record. The moving party may not include at this stage any additional undisputed facts or new evidentiary material. *All additional material facts set forth in the statement required of the opposing parties will be deemed to be admitted for summary judgment purposes unless controverted by the statement of the movant.*

REQUIREMENTS FOR EVIDENTIARY MATERIALS

The parties must submit all evidentiary materials (*e.g.*, affidavits, exhibits, deposition excerpts, or other products of discovery) relied upon in support of or opposition to potentially dispositive motions, except that materials included in the moving party's initial evidentiary submission may be referenced by any party opposing the motion, without re-submitting with additional copies of the same documents.

A. Organization

Each volume of evidentiary materials must include a table of contents that includes a brief narrative description of each document included: *e.g.*, "Plaintiff's Exhibit 1, Excerpts from the deposition of John Jones, pp. 37-45." For ease of citation, each affidavit, exhibit, deposition, or other product of discovery must be separately identified by a capital letter or arithmetic numeral (*i.e.*, "Exhibit A" or "Exhibit 1"); and, if the exhibit contains more than one page, each page must be separately numbered.[19]

Deposition transcripts that are submitted as part of the evidentiary record should include no more than four pages of deposition text per 8½" by 11" page.

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[19] A reference to that exhibit in the statement of facts or brief might be, "Plaintiff's Ex. 1, p. 41." The court does not, however, require any specific form as long as specific page references are used.

B. Number of Sets Submitted

The parties must file one set of evidentiary materials with the Clerk of Court, and simultaneously submit an exact copy to the court in chambers. Materials submitted to the court in chambers must contain the exact materials, and only the materials, filed with the Clerk. Stated differently, there must be *no differences* between the filed originals and the copies provided to the court in chambers. In the event of a later appeal, the court will not look favorably upon motions to supplement the record on appeal to add materials on the ground that such materials were submitted to the court, but were not filed with the Clerk.

C. Binding

The Clerk *will not accept bound materials* for filing, but the court's copy of the evidentiary submission *must be securely bound* — in separately numbered volumes, if necessary — for ease of use, *and*, to prevent inadvertent loss of pages.